Supreme Court, U.S.
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No. 99-1449

IN THE

Supreme Court of the United States

MASSACHUSETTS FOOD ASSOCIATION, *et al.*,
Petitioners,

v.

MASSACHUSETTS ALCOHOLIC BEVERAGES CONTROL COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITIONER'S REPLY MEMORANDUM

ALAN L. KOVACS
HOWARD J. WAYNE
EUGENE R. RICHARD
WAYNE, RICHARD, HURWITZ & MCALOON
One Boston Place
Boston, MA 02108
(617) 720-7870

ROBERT D. PAUL
(Counsel of Record)
J. MARK GIDLEY
JOCELYN A. AQUA
GUSTAV P. CHIARELLO
WHITE & CASE LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 626-3600
Attorneys for Petitioners

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ARGUMENT

I. RESPONDENTS DO NOT REFUTE THE CLEAR AND DIRECT CONFLICT BETWEEN THE FIRST AND NINTH CIRCUITS.

The argument advanced by Respondents does not refute the split in the circuits occasioned by the First Circuit's decision in *Massachusetts Food Association v. Massachusetts Alcoholic Beverages Commission.* Pet. Br. at 14a.

Specifically, Respondents fail to deal head-on with the Ninth Circuit's holding that preemption of the Sherman Act, 15 U.S.C. § 1, does not turn on whether there is an agreement among private parties. *See Miller v. Hedlund*, 813 F.2d 1344, 1349 (9th Cir. 1987) (rejecting need to show existence of an express agreement between private parties as condition for Sherman Act preemption). Rather than deal with the *Midcal-Duffy* line of cases, *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987); *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), Respondents instead string together, without discussion of the facts or legal analysis, a series of Ninth Circuit decisions that do not even address this issue, but simply evaluate the two-prong, state-action immunity analysis established in *Parker v. Brown*, 317 U.S. 341 (1943). *See Charley Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, 810 F.2d 869 (9th Cir. 1987) (no discussion of private agreements when addressing issue of *per se* violation of Sherman Act; limiting its analysis to issues of *Parker* immunity); *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989) (same); *Kern-Tulare Water District v. City of Bakersfield*, 828 F.2d 514, 518 (9th Cir. 1987) (same); *Traweek v. City and County of San Francisco*, 920 F.2d 589, 591 (9th Cir. 1990) (same). For the purposes of this appeal, the *Parker* immunity is not before the Court, Pet. Br. at 37a, because it is conceded that Petitioners' factual pleadings as to the absence of active state supervision are taken as true.

In sharp contrast, the First Circuit created whole-cloth a novel "private agreement" requirement for Sherman Act preemption, finding it therefore unnecessary to even consider the two-prong inquiry of *Parker* immunity. Therein lies the conflict among the circuits: the imposition by the First Circuit of a prerequisite "private agreement" among private parties that expressly was rejected by the Ninth Circuit.

Indeed, Respondents implicitly concede the conflict in the circuits by attacking the reasoning of the Ninth Circuit in *Miller*. Resp. Br. at 11, n.5. This argument is not only inconsistent with Respondent's position that *Miller* was decided in a manner that was in harmony with both Ninth and First Circuit precedent, *see* Resp. Br. at 11, but also fails to address the Ninth Circuit's explicit rejection of the necessity of a private agreement for Sherman Act preemption.

In the face of this undeniable conflict, Respondents are forced to allege without analysis or explanation that the split between the First and Ninth Circuits is not "real and embarrassing." *See* Resp. Br. at 13 (quoting *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955)). Quite to the contrary, the issue involved in the conflict deeply impacts whether federal law such as the Sherman Act will be applied uniformly across the nation. *See Midcal*, 445 U.S. at 110. This cannot be achieved without clear rules setting forth the limited situations in which a state statute will be preempted by federal law. As the First Circuit recognized, the present state of Sherman Act preemption "case law is not entirely coherent." Pet. Br. 4a. The split between the Ninth and the First Circuits leaves in doubt the validity of state alcohol laws facially prohibiting retailers from competing in at least eleven states. Pet. Br. at 11, n.2. This Court's guidance is critical to remove the present ambiguities that result from the conflict between the First and Ninth Circuits.

II. THE FIRST CIRCUIT'S DECISION CANNOT BE RECONCILED WITH SUPREME COURT PRECEDENT.

To avoid the precepts of the *Midcal-Duffy* line of cases, Respondents also boldly assert that Petitioners unduly rely on *Rice* without regard to other preemption case law. *See* Resp. Br. at 10. It is Respondents, however, that should be accused of such narrow-sightedness. Respondents cling to language parsed from the pages of the decision from *Fisher v. Berkeley*, 475 U.S. 260 (1986), without reconciling that case with the modern trilogy of Sherman Act preemption cases decided by this Court, namely *Midcal, Rice* and *Duffy*. Indeed, Respondents' only mention of *Duffy* occurs in a footnote devoid of any substantive analysis. *See* Resp. Br. at 10 n. 4. Absent such analysis, it is difficult to accept Respondents' further assertion that the Court of Appeal's decision is "entirely consistent with prior precedent of this Court." *See* Resp. Br. at 14.

As explained extensively in Petitioner's petition, *Midcal, Rice, Fisher* and *Duffy* establish that state statutes authorizing or compelling unlawful behavior that irreconcilably conflicts with the Sherman Act are facially preempted by the Sherman Act unless the statute meets the "active supervision" standard set forth in the *Parker* immunity inquiry—an analysis that was never initiated by the First Circuit in the present case. Pet. Br. at 7-12. No pronouncement from this Court, however, has ever suggested that the Sherman Act preemption analysis is short-circuited and the *Parker* test wholly disregarded simply because there is no agreement among private parties.

Here, the Massachusetts statute severally limits competition among private parties by restricting a retailer's number of outlets; the State otherwise is ignorant of the actual effects in the marketplace. That is because retailers retain the power to decide where they will compete and what prices they will charge. Similarly, in *Midcal* and *Duffy* the state interfered in the com-

petitive market but allowed private parties to exercise private discretion over the prices they charged. *See Duffy*, 479 U.S. at 337; *Midcal*, 445 U.S. at 99. It is this grant of "a degree of private regulatory power" that warranted preemption in *Midcal* and *Duffy* and that warrants the same treatment here.[1]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ALAN L. KOVACS
HOWARD J. WAYNE
EUGENE R. RICHARD
WAYNE, RICHARD, HURWITZ & MCALOON
One Boston Place
Boston, MA 02108
(617) 720-7870

ROBERT D. PAUL
(Counsel of Record)
J. MARK GIDLEY
JOCELYN A. AQUA
GUSTAV P. CHIARELLO
WHITE & CASE LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 626-3600
Attorneys for Petitioners

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[1] Reliance on the 21st Amendment in this Petition is without any factual or procedural basis. Respondents do not assert any 21st Amendment basis for defending the Massachusetts statute at this stage of the proceedings. With respect to the *Amicus Curiae* brief filed by The Beer Distributors of Massachusetts, Inc., the Wine & Spirits Wholesalers of Massachusetts and the Massachusetts Package Stores Association, the Petitioners simply note that this is an appeal from a granting of a motion to dismiss—not a motion for summary judgment—and all parties to the litigation and all lower courts properly deferred any 21st Amendment considerations. Moreover, none of the relevant Sherman Act preemption cases, such as this Court's decisions in *Midcal, Rice* or *Duffy*, or their numerous progeny relied on the 21st Amendment to save a state alcohol statute from Sherman Act preemption. Indeed, this Court in *Duffy* and *Midcal* explicitly rejected the 21st Amendment claims. See *Duffy*, 479 U.S. at 346; *Midcal* 445 U.S. at 107-110.